(24,656).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 423.

SWIFT & COMPANY, KINGAN & COMPANY, LIMITED, AND ARMOUR & COMPANY, PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

J. NOBLE HOOVER, ALLEGED BANKRUPT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 30, 1915.

a Supreme Court of the District of Columbia.

No. 899, Bankruptcy Docket.

In re J. NOBLE HOOVER, Alleged Bankrupt.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Order Allowing Amended Petition as Substitute.*

Filed December 5, 1913.

In the Supreme Court of the District of Columbia, Holding a Court of Bankruptcy.

No. 899, Dist. Court Doc.

In re J. NOBLE HOOVER, Alleged Bankrupt.

Upon motion of the petitioners creditors it is this 5th day of December 1913 ordered that said creditors have leave to file forthwith an amended petition as they may be advised the same to be taken as a substitute for the original petition.

By the Court:

ASHLEY M. GOULD, *Justice.*

Amended Petition.

Filed December 5, 1913.

In the Supreme Court of the District of Columbia, Holding a District Court.

Bankruptcy. No. 899.

In the Matter of the Bankruptcy of J. NOBLE HOOVER, Bankrupt.

2 The amended petition of Kingan & Company, Limited, a Corporation, Swift & Company, a Corporation, and Armour & Company, a Corporation, all doing business in the City of Washington, District of Columbia, respectfully shows:

1. That J. Noble Hoover, of the City of Washington, District of Columbia, has for the greater portion of six months next preceding

the date of filing this petition, had his principal place of business and has resided at the City of Washington, District of Columbia, and owes debts to the amount of $1,000.00 and is not a wage-earner nor chiefly engaged in farming or the tillage of the soil.

2. That your petitioners are creditors of said J. Noble Hoover, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $1,000.00. That the nature and amount of your petitioners' claims are as follows:

Kingan & Company, Limited, $923.85 for merchandise sold and delivered to the said J. Noble Hoover from and including the 15th day of February, 1913, to and including the 28th day of the same month.

Swift & Company, $959.32 for merchandise sold and delivered to the said J. Noble Hoover from and including the 15th day of February 1913, to and including the 28th day of February 1913.

Armour & Company, a Corporation, $709.47 for merchandise sold and delivered to the said J. Noble Hoover from and including the 17th day of February 1913, to and including the 3rd day of March 1913.

And your petitioners further represent that the said J. Noble Hoover while insolvent and within four months next preceding the date of the original petition committed an act of bankruptcy
3 by transferring a portion of his property to one of his creditors with intent to prefer such creditor over his other creditors, that is to say, by making two several payments of ten dollars each to Cudahy & Company, a Corporation, while so insolvent, upon pre-existing account.

Wherefore your petitioners pray that service of this amended petition with a subpœna may be made upon the said J. Noble Hoover, as provided in the acts of Congress relating to bankruptcy and that he may be adjudged by the Court to be a bankrupt within the purview of said acts.

KINGAN & CO., LTD.,
By LE BLOND BURDETT,
Gen'l Agent.

ARMOUR & CO.
J. G. BALDWIN,
General Agent.

SWIFT AND COMPANY,
By C. P. EICHMAN, *Gen. Ag't.*

Attorneys:
A. A. BIRNEY.
H. W. WHEATLEY.
LUCAS P. LOVING.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Personally appeared before me Le Blond Burdette who on oath says that he is the General Agent at the City of Washington, District of Columbia, of Kingan & Company, Limited, a Corporation doing business in said City and one of the petitioners above named; that

he is familiar with the dealings of J. Noble Hoover with the said Kingan & Company, Limited, and that the facts as stated in the foregoing amended petition which he has read are true as he verily believes.

4 Witness my hand and notarial seal this 21st day of November 1913.

JAMES A. PURCELL,
Notary Public, D. C.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Personally appeared before me J. G. Baldwin who on oath says that he is the General Agent at the City of Washington, District of Columbia, of Armour & Company, a Corporation doing business in said City and one of the petitioners above named; that he is familiar with the dealings of J. Noble Hoover with the said Armour & Company, and that the facts as stated in the foregoing amended petition which he has read are true as he verily believes.

J. G. BALDWIN.

Subscribed and sworn to before me this 24 day of Nov. 1913.
[SEAL.] M. E. WHEATLEY,
Notary Public, D. C.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Personally appeared before me C. P. Eichman who on oath says that he is the General Agent at the City of Washington, Dis-
5 trict of Columbia, of Swift & Company, a Corporation doing business in said City and one of the petitioners above named; that he is familiar with the dealings of J. Noble Hoover with the said Swift & Company, and that the facts as stated in the foregoing amended petition which he has read are true as he verily believes.

C. P. EICHMAN,
General Ag't.

Subscribed and sworn to before me this 26 day of Nov. 1913.
[SEAL.] FRANK B. GILMORE,
Notary Public, D. C.

Answer of Respondent to Amended Petition.

Filed December 12, 1913.

In the Supreme Court of the District of Columbia.

No. 899. In Bankruptcy.

In the Matter of J. NOBLE HOOVER.

The defendant, J. Noble Hoover, by protestation, not confessing nor acknowledging all or any of the matters or things in the said

amended petition of said petitioners mentioned and contained, to be true in such manner and form as the same are therein set forth and alleged, for answer to the whole of said petition says:

1. Answering paragraph one of said petition, defendant admits that the statements therein contained are true.

6 2. Answering paragraph two of said amended petition defendant admits that he is indebted to the several petitioners in the several amounts stated in said paragraph and that said debts were contracted at the times therein alleged.

Further answering defendant denies that while insolvent and within four months next preceding the date of the original petition he committed an act of bankruptcy by transferring a portion of his property to Cudahy & Co., a corporation, with intent to prefer such creditor over his other creditors. He admits that he made two several payments of Ten Dollars ($10) each to Cudahy & Co. but says that he did not make said payments with intent to prefer said creditor over his other creditors, but made them after said Cudahy & Co. had brought suit against him for $215.86, and for the purpose of preventing said Cudahy & Co. from obtaining a preference through judgment and execution in said suit. Defendant agreed to pay said Cudahy & Co. Ten Dollars ($10) per month if said creditor would suspend action in said suit, and defendant made said agreement and made said payments pursuant thereto for the purpose of protecting his assets against the said proceedings which Cudahy & Co. were then prosecuting with the intent on their part of securing a preference, and said suit was so suspended and has not since been prosecuted, and defendant's assets were so protected, and at the same time defendant offered to make proportionate payments to his other creditors, including the aforesaid petitioners herein, for the purpose of treating all of his creditors alike and preventing any of them from securing a preference over any others, which offer was bona

7 fide made before either of said payments of Ten Dollars ($10) was made to Cudahy & Co. and was maintained during the time said two payments were made and long after, and has never been withdrawn.

And defendant avers that he should not be declared bankrupt for any cause in said amended petition alleged and he demands that the same be inquired of by a Jury.

J. NOBLE HOOVER,
Defendant.

E. F. COLLADAY,
Attorney for Defendant.

Subscribed and sworn to by said J. Noble Hoover, before me, this 11th day of December, 1913.

[SEAL.]

JOSEPH STEIN,
Notary Public, D. C.

Verdict of Jury.

Filed February 17, 1915.

In the Supreme Court of the District of Columbia.

Bankruptcy. No. 899.

In re J. NOBLE HOOVER, Alleged Bankrupt.

On this first day of February, 1915, came Kingan & Co., Ltd., a corporation, Swift & Co., a corporation, and Armour & Co., a corporation, petitioning creditors in the above entitled cause, by their respective attorneys of record, and J. Noble Hoover in person
8 and also by his attorney of record, and a jury of good and lawful men of this District, to wit: George W. Offutt, James L. Sherwood, Luther L. Apple, Elias W. Wheeler, Thomas A. Warfield, William P. Seymour, Henry Knoch, Cabell H. Adams, Walter F. Cusick and William C. Peake, (it being stipulated and agreed by all of the parties to this proceeding that a jury of ten men shall act in lieu of the usual jury of twelve men) who are duly sworn to well and truly try the issues herein joined and being given the case in charge upon their oath say: In answer to the question "Was the respondent, J. Noble Hoover, insolvent at the time of either or both of the payments of Ten ($10) Dollars each to Kingan & Co?" To which said jury answered "Yes"; and "Did he make either or both of said payments with the intent to prefer the creditor to whom they were made over his other creditors?" to which question the said jury answered "No"; and thereupon the said jury found herein, by their general verdict "For the respondent" by reason of the premises.

The foregoing record of the special and general verdicts which were rendered in the above entitled cause on the first day of February, 1915, will be filed by the Clerk in said cause this 17th day of February, 1915, nunc pro tunc as of the said first day of February, 1915.

By the Court:

WALTER I. McCOY, *Justice.*

9 *Decree of Adjudication That Debtor Is Not Bankrupt.*

Filed February 17, 1915.

In the Supreme Court of the District of Columbia.

Bankruptcy. No. 899.

In re J. NOBLE HOOVER, Alleged Bankrupt.

This cause coming on for hearing on the first day of February, 1915, upon the amended petition of Kingan & Co. Ltd., a corpora-

tion, Swift & Co., a corporation, and Armour & Co., a corporation, petitioning creditors, the answer of the respondent, and the issues framed thereon before a jury of good and lawful men of this district, to wit: George W. Offutt, James L. Sherwood, Luther L. Apple, Elias W. Wheeler, Thomas A. Warfield, William P. Seymour, Henry Knoch, Cabell H. Adams, Walter F. Cusick and William C. Peake (it being stipulated and agreed by all of the parties to this proceeding that a jury of ten men shall act in lieu of the usual jury of twelve men) who having been duly sworn to well and truly try the above joined issues, after the case was given them in charge, upon their oath they returned their special and general verdicts heretofore filed herein, and said that they found said issues in favor of the respondent, J. Noble Hoover.

And thereupon, it is, this 17th day of February, A. D. 1915, Considered, adjudged, ordered and decreed that said J. Noble Hoover is not a bankrupt. Therefore, it is considered, adjudged, ordered, and decreed that said petition be and the same hereby is dismissed at the costs of said petitioners, and that respondent, J. Noble Hoover, have execution thereof.

By the Court:

WALTER I. McCOY, *Justice.*

Notice of Appeal and Writ Allowing Same.

Filed February 17, 1915.

In the Supreme Court of the District of Columbia, Holding a Bankruptcy Court.

Bankruptcy. No. 899.

In re J. NOBLE HOOVER, Bankrupt.

The petitioners, Swift & Company, a corporation; Kingan & Co., Ltd., a corporation, and Armour & Company, a corporation, in open court this 17th day of February, 1915, note an appeal from the decree and judgment of this Court entered on the 17th day of February, 1915, to the Supreme Court of the United States, and the same is hereby allowed and the bond, to act as supersedeas, is fixed at the sum of One hundred Dollars.

WALTER I. McCOY,

Justice Supreme Court of the District of Columbia.

11 *Petition for Writ of Error and Order Allowing Same.*

Filed February 17, 1915.

In the Supreme Court of the District of Columbia, Holding a Bankruptcy Court.

No. 899.

In re J. NOBLE HOOVER, Bankrupt.

Swift & Company, a corporation; Kingan & Company, Ltd., a corporation, and Armour & Company, a corporation, considering themselves aggrieved by the final decision of the Supreme Court of the District of Columbia in rendering a judgment against them and in favor of said J. Noble Hoover, and in finding the said J. Noble Hoover not bankrupt, and dismissing the petition of these petitioners that he be adjudged bankrupt in the above entitled cause, hereby pray a writ of error from said decision and judgment to the Supreme Court of the United States, and an order fixing the amount of the supersedeas bond.

And the said Swift & Company, a corporation; Kingan & Company, Ltd., a corporation, and Armour & Company, a corporation, assign the following errors in the record and proceedings in said case:

1. In admitting testimony to the effect that the said J. Noble Hoover had been in business for a number of years preceding and succeeding the filing of the petition in bankruptcy against him.

2. In admitting evidence that the said J. Noble Hoover
12 had purchased, after the filing of the petition in bankruptcy against him, merchandise from the petitioners.

3. In admitting testimony by the said J. Noble Hoover of his intent and purpose and motives when he made the preferential payments set forth in the petition in bankruptcy and acknowledged by him to the Cudahy Packing Company.

4. In admitting testimony by the said J. Noble Hoover to the effect that he did not intend to give a preference when he paid to Cudahy, out of his estate, the preferential payments alleged in the petition and acknowledged by him, when the effect of said payments was, in fact, to give a preference.

5. In overruling the petitioner's motion to direct the jury to return a verdict for the petitioners.

6. In submitting the question of insolvency to the jury.

7. In submitting the question of intent to the jury.

8. In refusing the petitioners' second prayer for instructions.

9. In not discharging the jury from further consideration in the case when it became apparent it did not understand the instructions of the Court.

For which errors the said Swift & Company, a corporation; Kingan & Company, Ltd., a corporation, and Armour & Company, a cor-

poration, pray that the judgment of the Supreme Court of the District of Columbia, dated 17th day of February, 1915, be reversed and a judgment in their favor be rendered, with costs.

L. P. LOVING,
Attorney for Swift & Co.
A. A. BIRNEY,
Attorney for Kingan & Co.
H. WINSHIP WHEATLEY,
Attorney for Armour & Co.

13 Let the writ issue upon the execution of a bond by Swift & Co., a corporation; Kingan & Co., Ltd., a corporation, and Armour & Company, a corporation, to the said J. Noble Hoover with surety in the sum of One hundred Dollars, such bond when approved to act as supersedeas.

By the Court this 17th day of February, 1915, counsel for all parties being present in Court.

WALTER I. McCOY,
Justice Supreme Court, D. C.

Marshal's Return.

Served copy of the within petition on J. Noble Hoover, personally, March 19, 1915.

MAURICE SPLAIN,
U. S. Marshal.

R.

14 Filed Feb. 17, 1915. J. R. Young, Clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, between Swift & Company, a corporation; Kingan & Co., Ltd., a corporation, and Armour & Company, a corporation, petitioners, vs. J. Noble Hoover, alleged bankrupt, a manifest error hath happened, to the great damage of the said Swift & Company, a corporation; Kingan & Company, Ltd., a corporation, and Armour & Company, a corporation, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of
15 the United States, the 17th day of February, in the year of our Lord, one thousand nine hundred and fifteen.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk of the Supreme Court of the District of Columbia.

Allowed by
WALTER I. McCOY,
Justice Supreme Court, D. C.

Counsel for all parties being present in Court.
(Over.)

15½ [Endorsed:] March 19, 1915. Served copy of the within writ on J. Noble Hoover personally March 19, 1915. Maurice Splain, U. S. Marshal. R.

16 *Bond on Writ of Error.*

Filed March 2, 1915.

In the Supreme Court of the District of Columbia, Holding a Bankruptcy Court.

Bankruptcy. No. 899.

In re J. NOBLE HOOVER.

Know all men by these presents, That we, Swift & Company, a corporation; Kingan & Company, Ltd., a corporation, and Armour & Company, a corporation, as principals, and National Surety Company, as surety, are held and firmly bound unto the above-named J. Noble Hoover, in the full sum of one hundred dollars, to be paid to the said J. Noble Hoover, his executors, administrators, successors, or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally and our and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 2nd day of March, in the year of our Lord one thousand nine hundred and fifteen.

Whereas the above-named Swift & Company, a corporation; Kingan & Company, Ltd., a corporation, and Armour & Company, a corporation, have prosecuted and been allowed a writ of error to the

Supreme Court of the United States, to reverse the judgment rendered in the above suit by the said Supreme Court of the District of Columbia:

17 Now therefore, the condition of this obligation is such, That if the above named Swift & Company, a corporation, Kingan & Company, a corporation, and Armour & Company a corporation, shall prosecute said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

KINGAN & COMPANY, LIMITED,
By SAMUEL REID, [SEAL.]
Agent & Att'y in Fact.
SWIFT & COMPANY,
By W. W. SHERMAN, [SEAL.]
Ass't Treas.
ARMOUR AND COMPANY,
CHARLES E. HAZARD,
Ass't Sec'y.

Sealed and delivered in the presence of:
NATIONAL SURETY CO.,
By W. H. RONSAVILLE, [SEAL.]
Attorney-in-Fact.

Approved, March 2nd, 1915.
WALTER I. McCOY,
Justice S. C., D. C.

18 *Bond on Appeal.*

Filed March 2, 1915.

In the Supreme Court of the District of Columbia, Holding a Bankruptcy Court.

Bankruptcy. No. 899.

In re J. NOBLE HOOVER.

Know all men by these presents, That we, Swift & Company, a corporation; Kingan & Company, Ltd., a corporation, and Armour & Company, a corporation, as principals, and National Surety Company, as surety, are held and firmly bound unto the above-named J. Noble Hoover, in the full sum of One hundred Dollars, to be paid to the said J. Noble Hoover, his executors, administrators, successors, or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators successors and assigns, firmly by these presents.

Sealed with our seals and dated this 2nd day of March, in the year of our Lord one thousand nine hundred and fifteen.

Whereas the above-named Swift & Company, a corporation; Kingan & Company, Ltd., a corporation, and Armour & Company, a corporation, have prosecuted and been allowed an appeal to the Supreme Court of the United States, to reverse the decree ren-
19 dered in the above suit by the said Supreme Court of the District of Columbia.

Now therefore, the condition of this obligation is such that if the above-named Swift & Company, a corporation; Kingan & Company, Ltd., a corporation and Armour & Company, a corporation, shall prosecute said appeal to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

KINGAN & CO., LIMITED,
By SAMUEL REID, [SEAL.]
Agent & Att'y in Fact.
SWIFT & COMPANY,
By W. W. SHERMAN, [SEAL.]
Ass't Treas.
ARMOUR AND COMPANY.
CHARLES E. HAZARD, [SEAL.]
Ass't Sec'y.

Sealed and delivered in the presence of:

NATIONAL SURETY CO.,
By W. H. RONSAVILLE, [SEAL.]
Attorney-in-Fact.

Approved the 2nd day of March, 1915.
WALTER I. McCOY,
Justice S. C., D. C.

No objection:
E. F. COLLADAY,
Att'y for Hoover.

20 Supreme Court of the District of Columbia.

FRIDAY, March 5th, 1915.

Session resumed pursuant to adjournment, present presiding, Mr. Justice McCoy.

* * * * * * *

Bankruptcy. No. 899.

In re J. NOBLE HOOVER, Alleged Bankrupt.

Now come the petitioners herein by their attorneys of record and submit to Court their bill of exceptions taken during the trial of this

case which is taken under consideration by the Court this 5th day of March 1915.

By the Court:

WALTER I. McCOY, *Justice.*

21 *Memorandum.*

March 18, 1915—Bill of Exceptions signed by Justice McCoy.

Bill of Exceptions.

Filed March 18, 1915.

In the Supreme Court of the District of Columbia, Holding a Bankruptcy Court.

No. 899, B'k'tcy.

In the Matter of J. NOBLE HOOVER, Alleged Bankrupt.

Be it remembered that on the trial of this cause the petitioners, to maintain the issue on their part joined, called as a witness the respondent, J. Noble Hoover, who thereupon gave testimony tending to prove that Mr. Edward F. Colladay is, and was on March 14, 1913, his attorney; that through said Edward F. Colladay the witness sent out to the petitioner, Kingan & Company, a letter in words and figures as follows:

"March 14, 1913.

Kingan & Company, Washington, D. C.

GENTLEMEN: As attorney for Mr. J. Noble Hoover of 88 Arcade Market, I submit to you, and by this mail am submitting to Mr. Hoover's other creditors the following statement and proposition of settlement.

Mr. Hoover is indebted to meat houses as follows:

22

Kingan & Co.	$923.85
Swift & Co.	958.32
Armour & Co. Center Market	159.48
Armour & Co., B Street	559.99
The Cudahy Packing Co.	215.86
Morris & Co.	522.69
	$3,341.19

His other indebtedness consists of several small bills for current expenses not exceeding $50.00 in aggregate.

His assets consist of:

Implements of his business located at his stand worth about	$200.00
Stock in trade worth about	150.00
One delivery wagon and horse	150.00
Book Accounts about	300.00
Cash	200.00
	$1,000.00

About two-thirds of the book accounts are collectible if Mr. Hoover continues in business.

Suit has been brought by the Cudahy Packing Co. on their bill and is now pending in the Municipal Court of this District.

Mr. Hoover prefers to continue in business, if his creditors will permit him to do so.

In his behalf I request that you and the other meat houses defer action on your claims and accept from him monthly payments on account, as follows:

Kingan & Co.	$25.00 per month	
Swift & Co.	25.00 per month	
Armour & Co., both houses	10.00 per month	each
The Cudahy Packing Co.	10.00 per month	
Morris & Co.	15.00 per month.	

Kindly let me have an immediate reply, which is necessary in view of the pendency of the suit of Cudahy Packing Co.

Very truly yours,

(Sgd.) E. F. COLLADAY."

And on the same day sent to the petitioners, Swift & Company and Armour & Company and to Morris & Company and Cudahy & Company, other creditors of the witness, similar letters, and thereupon said letter was read in evidence to the jury. And said witness further testified that none of the creditors mentioned in said letter had any security for their debts; that the statement of his assets contained in said letter was a true statement and that he had nothing else and that after the writing of said letter he made two payments to Cudahy & Company, a creditor named in said letter, said payments being of $10.00 each, according to an agreement, to prevent them from getting a judgment. And thereupon the witness, being cross-examined by his counsel, further testified that he had been in business in the District of Columbia for fourteen years as a meat merchant in the market and yet conducts such business, first in Center Market and now in the Arcade Market, and was in the Arcade Market at the time of issuing the letter; that his offer in the letter was made in good faith and still remains. And thereupon the witness was asked by his counsel the following question:

23

Q. Were your monthly earnings at that time sufficient to make those payments?

To which question counsel for the petitioners then and there ob-

jected on the ground that it was irrelevant, incompetent and immaterial but the Justice presiding overruled said objection and permitted the said question to be answered, to which ruling counsel for the petitioners then and there duly excepted, and thereupon the witness answered:

A. They were.

That the first payment was made on March 15, 1913. And thereupon the witness was further asked by his counsel:

24 A. On that date were you financially able to make to the other creditors named in the letter which has been read, the proportionate payments specified in that letter?

To which question counsel for the petitioners then and there objected on the ground that said question was immaterial and also on the ground that the payments show that by the very offer Cudahy & Company was preferred to the other creditors, but the Justice presiding overruled such objection and allowed the question to be answered, to which ruling counsel for the petitioners then and there duly excepted and witness answered such question in the affirmative. The witness was then asked the further question:

Q. Mr. Hoover, the second payment was made on April 15, 1913. Were you on that date able and willing to make to the other creditors named in the letter now in evidence the several payments there tendered to them? A. I was.

Q. Did you ever withdraw that tender to the other creditors? A. It never has been withdrawn.

Q. Why did you make the offer to them?

And to the last question counsel for the petitioners then and there objected on the ground that it was immaterial and incompetent, and also on the ground that the payments show that by the very offer Cudahy & Company was preferred to the other creditors. Said objetcion was overruled by the Court and witness was allowed to answer the question, to which ruling counsel then and there duly excepted and thereupon the witness answered:

A. I made the offer of payment because Cudahy had brought suit against me, and I made the offer to prevent Cudahy from get-

25 ting a judgment against me and thereby to annoy or attach my assets.

And said witness further testified that he made the offer to the other creditors at the same time because he desired to treat all his creditors alike. He further testified that he had continued in businness ever since the offer was made and that at the time the offer was made he was purchasing supplies from these several creditors.

And thereupon, on re-direct examination, said witness testified that he made the two payments of $10.00 each through his attorney, to Cudahy & Company on March 15 and April 15, 1913; that at that time no other creditor had sued him; that Kingan & Company afterward sued him; that he made no payments to any of the creditors named in his letter except Cudahy & Company and did not make the other payments because they would not agree to accept monthly instalments; that he could have paid the suggested monthly instalments but did not and paid them nothing; that "They instituted this

proceeding here, which stopped it"; and he has not made any tender to them other than what is found in the letter.

And thereupon, on re-cross-examination said witness, in answer to questions of his counsel testified that ever since the writing of that letter he had purchased goods daily from the several petitioners and had paid them in cash therefor; that the creditors refused his tender of payment in the letter by their silence; that after the writing of said letter he left the matter in the hands of his attorney, but stood ready to make the payments offered therein ever since, and
26 his earnings have been sufficient from month to month to make those payments. He further testified that in April 1913, he was sued by Kingan & Company, one of the petitioners, for $923.85, at which time his offer in his letter of March 14, 1913, was still pending and he was ready and willing to make the payments to Kingan & Company as stated in said letter, as well as to his other creditors, and that he is still ready to do so. That since said letter was issued his place of business has never been closed, except on Sundays and holidays. He further testified, on re-examination by counsel for petitioners, that since the recovery of judgment against him by said Kingan & Company he has had no stock in trade or other assets in excess of those exempt from levy and execution and that neither Kingan & Company or Cudahy & Company could have made their judgment if they had tried.

He further testified, on re-cross-examination by his counsel, that he had book accounts of $300.00 and cash on hand of about $200.00, which were not exempt and that he continued to have book accounts and cash in hand with which he bought his stock and carried on his business ever since the letter of March 14, 1913, went out.

And thereupon counsel for the petitioners offered in evidence the judgment of Kingan & Company against J. Noble Hoover, the defendant, showing a recovery on May 16, 1913, for $923.85 and here the petitioners rested.

And thereupon the defendant called as a witness on his behalf one George F. Havell, an attorney, who gave evidence tending to prove that he was attorney for Cudahy & Company in March and April, 1913, and as such brought suit against the respondent
27 for said firm for the sum of $215.85 in the Municipal Court of the District of Columbia, and actively prosecuted the suit; that he received a letter such as that which has been offered in evidence and that he received two payments of $10.00 each an account of said claim after said suit was instituted. And thereupon the witness was asked the following question:

Q. Upon receiving those payments or receiving the first payment did you make an agreement with the defendant's attorney to suspend that action?

To which question counsel for the petitioners then and there objected, but the Justice presiding overruled said objection, saying:

"I will admit it on the question of intent."

To which ruling counsel for the petitioners then and there duly excepted. Whereupon, witness answered that he did have such an agreement with counsel for defendant. Witness further testified that

he accepted the proposition contained in said letter of respondent, and by letter in evidence agreed to suspend the suit. Upon cross-examination said witness gave evidence tending to prove that when he received such payments he did not know anything about what, if anything, was being paid to other creditors, that he was solicited to join in this bankruptcy suit and refused to do so, and that since his acceptance of said offer he has not attempted to take judgment in said case and that after the filing of the petition in bankruptcy no further payments were made, and that the said Cudahy & Company instituted its suit on March 8, 1913. Following is a copy of said letter:

28 "March 14, 1913.

E. F. Colladay, Esq., Union Trust Bldg., City.

Cudahy Packing Co. *v.* Hoover.

DEAR MR. COLLADAY: In this matter the Cudahy Packing Co. has called for our advice as to what course it shall adopt. Mr. Hawken and myself are agreed that the request made by you shall be complied with, to wit, Hoover to pay us $10 per month unless at some future time he shall be in a position to pay more. First payment to be made March 15, and on the 15th of each succeeding month a like sum. We will continue the case indefinitely subject to call on two days' notice in default of any payment. Hoover to pay for said continuance and all costs of suit.

Very truly yours,

S. McC. HAWKIN.
G. T. HAVELL."

And thereupon counsel for respondent offered in evidence the record of the Municipal Court showing the suit instituted by Cudahy & Company as aforesaid on March 8, 1913, and for the sum of $215.86, and that on March 17, the suit was continued indefinitely at the request of the defendant, and to said record counsel for the petitioners then and there objected on the ground that it was irrelevant, but the Justice presiding overruled said objection and suffered the said record to be offered in evidence and to such ruling counsel for the petitioners then and there duly excepted.

No further testimony or evidence was given in the said cause.

And thereupon counsel for the petitioners moved the Court to instruct the jury to return a verdict in favor of the petitioners but the Justice presiding then and there refused to grant the
29 said instruction as prayed, to which refusal counsel for the petitioners then and there duly excepted. And thereupon said petitioners prayed the Court to instruct the jury as follows:

"The jury are instructed that it is conclusively established by the testimony of the defendant Hoover that he was insolvent in March and April, 1913, and knew himself to be insolvent. If, therefore, they shall find that while insolvent, and having knowledge of his insolvency, he made payments to Cudahy & Company on account of his pre-existing debt to them, and did not make similar payments

to his other creditors, he committed an act of bankruptcy, and the jury should so find."

But the Justice presiding then and there refused to give such instruction and to such refusal counsel for the petitioners then and there duly excepted. And thereupon the Justice presiding charged the jury as follows:

"The matter before you is to be determined as of the time when these two payments were made, and there are two questions before you to determine as of that time: Was Mr. Hoover insolvent at that time, and was either or were both of those payments made with the intent to prefer the creditor to whom they were made?

Section Three of the Bankruptcy Law provides that any one of several things done by a bankrupt shall constitute an act of bankruptcy, and one of those is that the alleged bankrupt has transferred, while insolvent, any portion of his property to one or more
30 of his creditors with intent to prefer such creditor over his other creditors. There must be two things, a transfer while insolvent, with an intent to make a preference.

The petitioning creditors rely upon the clause just quoted, and claim that the alleged bankrupt did, while insolvent, transfer, a portion of his property to a creditor with intent to prefer that creditor over his other creditors. The transfers, namely, the two payments of $10.00 each, are not disputed, and if you find at the time when either of them was made the alleged bankrupt was insolvent and that the payment was made with intent to prefer the creditors receiving the payment over the other creditors, your verdict should so state.

The bankruptcy law defines the meaning of the word "insolvent," and of course that definition is the one that must be taken in this case. The definition is as follows:

"A person shall be deemed insolvent within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed, or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

A statement of the Bankrupt's assets made by him is in evidence, and in reaching your conclusion as to his solvency or insolvency that statement should be considered. But it has also been testified that the alleged bankrupt had been in business in the District of Columbia for several years, and he testifies also as to his re-
31 ceipts therein in the manner you have heard, not stating just what they were, but you heard the testimony on that point. You may take that fact into consideration in determining the question of solvency or insolvency within the definition of the law, if you believe the testimony, and may, if you find that the business had any good will at the time of the payments, place such valuation on it as, in your judgment, and on the other evidence in the case, is reasonable; and you may consider, in that connection, the omission of the item of good will from the statement which the bankrupt sent to his creditors.

If you find that the alleged bankrupt was insolvent at the time of the payments, or either of them, you will then decide whether or not, when he made either of the payments, he did so with the intent to prefer the creditor to whom the payments were made, over his other creditors; and in reaching your conclusion on that point you will take into consideration all the surrounding circumstances of the case bearing on the question of intent as they have been testified to here.

There are two questions, then, to be determined as of the time when either or both of these payments was or were made, namely, the question of solvency; and on that point the bankruptcy law says that the alleged bankrupt has the burden of proof, that is, the burden of proving solvency, as the law says, shall be on the alleged bankrupt, and he must prove that by a preponderance of the evidence.

The other question is as to the intent, as I have already
32 explained, and on the question of the intent of the bankrupt in making either or both of these payments the petitioning creditors have the burden of proof, and they must prove by a preponderance of the evidence that the bankrupt did have such intent.

These are the only questions for you to decide."

And thereupon the Justice presiding directed the jury to find a special verdict answering the two following questions:

First. Was the respondent, J. Noble Hoover, insolvent at the time of either or both of the payments of $10.00 each to Cudahy & Company, and

Second. Did he make either or both of said payments with the intent to prefer the creditor to whom they were made over his other creditors?

And also to bring in a general verdict for —.

And to so much of the said charge of the Court as submitted to the said jury the questions of solvency of the said respondent and of the value of good will of his business, the petitioners then and there duly excepted.

With reference to the questions submitted to the Jury for a special verdict the following occurred:

Mr. Birney: Would it not be better to submit those questions in writing, if the Court please? That is what is usually done in the Circuit Courts.

The Court: Yes, I think it would be better if it were done that way. * * *

33 The questions were reduced to writing and so submitted to the Jury.

The Court further instructed the Jury on the matter of good will as follows: That the only evidence on the point is that the respondent had been in business for so long, about fourteen years, and that at the time of the payments in question his business was paying him a good profit; that Mr. Hoover testified to those two things on the witness stand, and that is all the Jury has to go by; that if the Jury could ascertain from that testimony what the value of the

good will was, then they would have to include it in his assets, but if they were unable to do so they could not include it.

And thereupon the jury retired to consider of their verdict and thereafter returned into the Court and stated that they were able to agree on an answer to one question but not on an answer to the other and wished to be instructed as to what verdict to bring in under those circumstances, and thereupon the jurors, being inquired of, one of them stated as follows:

"We want to know the result of a vote on this question: Was Hoover insolvent at the time he made either of the payments to Cudahy; If we vote "Yes" does that throw him into bankruptcy?

To which the Court answered:

"Not unless you answer the second question in the affirmative."

The Juror: "We agree on the second question."

The Court: "If you say he was insolvent then you should say whether he made the payments with intent to prefer. If
34 you answer that question in the affirmative then the adjudication goes against him in bankruptcy. If you say he was not insolvent, that is all there is to it, but if you answer the first one affirmatively then the second one has to be answered in order that you may reach a verdict.

If you find that he was insolvent and you answer the second question "yes," then he goes into bankruptcy. If you answer it "No," then he does not go into bankruptcy, because the two things have to concur, insolvency and the preferential payments. Do I make that clear?

A Juror: I think so.

The Court: But I think it is proper to say that the effect of your verdict is not for you to consider. You are simply to answer the questions, that is all, and the law takes care of the consequences.

The jury thereupon retired and thereafter returned into Court and to the first question answered "Yes" and to the second question answered "No."

Said jury were further instructed by the Court that they should find a general verdict in the case and that as their special verdicts stood their verdict should be for the respondent and thereupon counsel for the petitioners asked that said jurors might be polled and they were so polled, whereupon, in answer to the question "If he found for the respondent" one of said jurors answered: "If instructed to do so by the Court." Whereupon, counsel for the petitioners moved the Court to discharge the said jury upon the ground that it was evident they had not understood the charge of the Court, but the Justice presiding then and there refused to discharge
35 said jury, to which ruling counsel for the petitioners then and there duly excepted, and directed them to retire and consider of their general verdict and said jury afterward returned in Court and found their general verdict for the respondent, and by request of counsel for petitioners, the jurors were polled and each and every answered that his verdict was for the respondent.

And counsel for petitioners now pray the Court to sign this,

their bill of exceptions, which is done, now for then, this 18th day of March, 1915.

By the Court:

WALTER I. McCOY, *Justice.* [SEAL.]

Supreme Court of the District of Columbia.

FRIDAY, March 19th, 1915.

Session resumed pursuant to adjournment, present presiding Mr. Justice McCoy.

* * * * * * *

Bankruptcy. No. 899.

In re J. NOBLE HOOVER.

Now come here the petitioners herein as well as the respondent by their respective attorneys and pray that the bill of exceptions taken during the trial of this cause and heretofore submitted
36 to the Court, be signed and made part of the record, now for then, which is accordingly done.

WALTER I. McCOY, *Justice.*

Designation of Record.

Filed March 19, 1915.

In the Supreme Court of the District of Columbia, Holding a Bankruptcy Court.

Bankruptcy. No. 899.

In re J. NOBLE HOOVER, Alleged Bankrupt.

The Clerk will please include in the record on appeal, the following papers and proceedings:

Amended petition filed December 5, 1913.
Answer of respondent filed December 12, 1913.
Verdict of jury February 17, 1915, as of Feb. 1st.
Decree of February 17, 1915.
February 17, 1915, appeal notation.
February 17, 1915, Petition for writ of error and allowance of same and service of same.
March 2nd, Bonds on appeal and writ of error approved.
March 5, Bill of exception submitted.
March 18, Bill of exceptions and order making same of record.

H. WINSHIP WHEATLEY,
A. A. BIRNEY,
L. P. LOVING,
Att'ys for Appellants.

37 Supreme Court of the District of Columbia.

SATURDAY, March 20th, 1915.

Session resumed pursuant to adjournment, present presiding Mr. Justice McCoy.

Bankruptcy. No. 899.

In re J. NOBLE HOOVER, Alleged Bankrupt.

Upon consideration of the motion of counsel for the petitioners herein, and for cause shown, it is by the Court this 20th day of March, 1915,

Ordered. That the time within which the record in this cause shall be filed in the Supreme Court of the United States be and the same is hereby extended until and including April 6th, 1915.

WALTER I. McCOY, *Justice.*

38 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 37, both inclusive, to be a true and correcct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Bankruptcy Cause No. 899, entitled: In Re, J. Noble Hoover, alleged Bankrupt; as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of April, 1915.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Assistant Clerk.

Endorsed on cover: File No. 24,656. District of Columbia Supreme Court. Term No. 423. Swift & Company, Kingan & Company, Ltd., and Armour & Company, plaintiffs in error and appellants, vs. J. Noble Hoover, alleged bankrupt. Filed April 5th, 1915. File No. 24,656.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 101.

SWIFT & COMPANY, KINGAN & COMPANY, LIMITED, and ARMOUR & COMPANY, Plaintiffs in Error and Appellants,

vs.

J. NOBLE HOOVER, Alleged Bankrupt.

BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANTS.

STATEMENT.

Plaintiffs in Error and Appellants filed their petition in the Supreme Court of the District of Columbia, holding a Bankruptcy Court praying that defendant might be adjudg-

ed a bankrupt. The debts due the three petitioners were $923.85, $959.32 and $709.47 respectively.

The act of bankruptcy charged was that defendant had while insolvent, and within four months of the filing of the petition, transferred a portion of his property to one of his creditors with intent to prefer such creditor over his other creditors, that is to say by making two payments of ten dollars each to Cudahy & Company, a corporation while so insolvent, upon pre-existing account. (Rec. 1, 2).

Defendant's answer to the petition admitted the alleged debts to the petitioners and the payments to Cudahy & Company, and did not deny his insolvency, but did deny that the payments were made with intent to prefer, and averred that these payments were made "after said Cudahy & Co. had brought suit against him for $215.86 and for the purpose of preventing said Cudahy & Co. from obtaining a preference through judgment and execution in said suit."

That he agreed to pay Cudahy & Co. ten dollars a month, and at the same time offered to make proportionate payments to his other creditors for the purpose of treating all of his creditors alike and preventing any of them from securing a preference.

Upon a trial before a jury a special verdict was rendered finding that Hoover was insolvent at the time he made the payments to Cudahy & Co., but did not make them with intent to prefer. (Rec. 5).

The Court gave judgment for the defendant and after a bill of exceptions was signed the petitioning creditors brought the cause here both on writ of error and by appeal.

While the amounts involved are small the legal theory adopted by the presiding judge may be so disastrous to the creditors in the future that they felt it necessary to secure the opinion of this Court.

THE EXCEPTIONS.

Upon the trial conclusive proof was given that on and after March 14, 1913, defendant was insolvent. On that day he wrote the petitioners and others stating his debts to them at $3,341.19 and his assets of all kinds at $1,000, and offering monthly payments of small sums if permitted to remain in business. On March 15 and on April 15, he made payments of $10 each to Cudahy & Co., one of the creditors named in his letter, on account of the debt of $215.86 mentioned, making no payment to any other creditors.

Called as a witness defendant admitted the facts as recited, but denied that in making the payments he intended a preference, and averred they were made for the purpose of preventing said Cudahy & Co. from getting a judgment and thereby to annoy him by attaching his assets (Rec. pp. 13, 14); and that he did not pay other creditors "because they would not agree to accept monthly instalments." (Rec. p. 14).

This being in substance all the testimony the petitioners requested the Court to instruct the jury to find their verdict for the petitioners but he refused to so instruct (Rec. 16).

The petitioners then asked the following instructions:

> "The jury are instructed that it is conclusively established by the testimony of the defendant Hoover that he was insolvent in March and April, 1913, and knew himself to be insolvent. If, therefore, they shall find that while insolvent and having knowledge of his insolvency, he made payments to Cudahy & Company on account of his pre-existing debt to them, and did not make similar payments to his other creditors he committed an act of bankruptcy, and the jury should so find."

The Court refused this prayer and left to the jury both the issues of insolvency and intent to give a preference, the latter to be determined upon a consideration of all the circumstances, and also charged that the burden of proof of intent to prefer was upon the petitioners. (Rec. p. 18).

The verdict found that defendant was insolvent but had not made the payments with intent to prefer.

ARGUMENT.

The petitioners were entitled to the instructed verdict they asked. In refusing it the Court confounded intent with motive and rejected the settled doctrine that a man must be conclusively presumed to have intended the necessary consequences of his act. The proposition involved in the case at bar is fully covered by the language of the Court in Webb *vs.* Sacks, 15 Nat. Bk. Rep. p. 171, as follows:

> "If a debtor, with knowledge of his insolvency, does an act which operates as a preference to one of his creditors he is presumed to have so intended, as that is the necessary consequence of his act; and the additional fact that such debtor was really moved to give such preference for any other or particular reason such as to save costs or satisfy the solicitations of an importunate creditor, or preserve his good will and keep up in business does not affect such presumption. Whatever the debtor's motive may be he is presumed to intend the natural and necessary consequences of his acts."

So in Silverman's Case, 4 Nat. Bk., Rep. 523, the Court said:

> "I cannot conceive any circumstances under which

an insolvent debtor can make a payment to one of his creditors without intending to thereby prefer such creditor, unless it be when the debtor is ignorant at the time of his insolvency."

The case contains a full citation of authorities in support of the conclusion that if a debtor with knowledge of his insolvency transfers property to one or more creditors to the exclusion of others, an intent to prefer will *be conclusively presumed.*

In re Gilbut, 112 Fed. 951.
In re Foley, 140 Fed. 300.

This Court reached the same conclusion in a case where it was found as a fact that while the creditor intended by retaining certain moneys to obtain a preference the bankrupt "had no such intention," saying:

"This conclusion moreover is the result of the finding that Harrison had no intention to give to the tie company a preference, for if Harrison, being insolvent to the knowledge of the company, within the prohibited period, gave to the tie company authority to collect the sums due to him by the laborers for goods sold them, with the right to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference, and if the inevitable result of the transaction would have been to create such a preference, *then the law would conclusively impute* the intention to bring about the result necessarily resulting from the nature of the act which he did."

Western Tie, etc. Co. *vs.* Brown, 196 U. S. 502, 508.

The intent is presumed from the act itself, since one is held to intend the natural result of his own act.

Webb *vs.* Sacks, 15 Nat. Bk. R. 171.
Johnson *vs.* Wald, 2 Am. Bk. R. 84, S. C. 93 Fed. 640.

The oath of the defendant that he did not intend a preference is entitled to no weight as against the act of payment to one creditor, when made with knowledge of insolvency

Macon Grocery Co. *vs.* Beach, 19 Am. Bk. R. 558, 562.
In re Smith, Fed. Case No. 12,974.
In Webb *vs.* Sacks, 15 Nat. Bk. R. 171, the Court says:

"Where by law the consequences must necessarily follow the act done, the presumption is ordinarily conclusive and cannot be rebutted by any evidence of a want of any such intention."

Nadus Bank *vs.* Campbell, 14 Wall. 87.
Johnson *vs.* Wald, 2 Am. Bk. Rep. 84, Note.

Authorities might be multiplied but it would appear unnecessary to do so. The view of the Court below would be most demoralizing and has little or no support in the decisions of other courts.

The payments of money were transfers of property within the meaning of the bankruptcy statute.

Jaqwith *vs.* Allen, 189 W. S., 78.
Pirie *vs.* Trust Co., 102 U. S., 438.

It is submitted that on both points submitted to the jury they should have been directed to find for the petitioners, or, at the worst, that the prayer on their behalf found on the Record pp. 16, 17, should have been given.

ARTHUR A. BIRNEY,
H. W. WHEATLEY,
LUCAS P. LOVING,

Attorneys for Plaintiffs in Error and Appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

SWIFT & COMPANY, KINGAN & COMPANY, LIMITED, and ARMOUR AND COMPANY, *Plaintiffs in Error and Appellants,*

vs.

J. NOBLE HOOVER, *Alleged Bankrupt.*

No. 101.

BRIEF FOR ALLEGED BANKRUPT.

STATEMENT OF FACTS.

On December 5, 1913, Plaintiffs-in-Error and Appellants filed in the Supreme Court of the District of Columbia their amended petition praying that J. Noble Hoover be adjudged a bankrupt. Said amended petition alleged that defendant Hoover owed debts to the amount of $1,000.00; that the petitioners held provable claims against him aggregating more than $1,000.00; and that such claims were as follows: Kingan & Co., Ltd., $923.86; Swift & Co., $959.32; and Armour & Co., $709.47.

It was further alleged that, while insolvent, and within four months next preceding the filing of the amended petition, said Hoover committed an act of bankruptcy by transferring a *portion* of his property to one of his creditors with intent to prefer said creditor; that is to say, by making two payments of $10.00

each to Cudahy & Co., on a pre-existing account. (R. pp. 1-2.)

Defendant Hoover answered without specifically denying insolvency and admitted the indebtedness to petitioners. He further admitted making the two payments of $10.00 each to Cudahy & Co., but denied his intention to prefer that company over his other creditors, and stated that said payments were made after suit had been instituted against him by Cudahy & Co., for $215.86; also that the payments were made for the purpose of preventing said company from obtaining, through judgment and execution in said suit, a preference over other creditors. Defendant alleged that he did agree with Cudahy & Co. to pay $10.00 a month on his account with them, on the understanding that said action against him would be suspended; and, furthermore, he averred that the agreement with Cudahy & Co., pursuant to which the two payments of $10.00 each were made, was entered into for the purpose of protecting his assets against said suit, which had been instituted for the purpose of obtaining a preference. The suit was suspended, according to agreement. When defendant's offer was made to Cudahy & Co., as aforesaid, he at the same time offered, for the purpose of treating all his creditors alike and preventing any one or more from obtaining a preference, to make proportionate payments on their accounts; and this offer included petitioners in the court below. Said offer to creditors was made prior to either of the two payments of $10.00 each to Cudahy & Co., but that company was the only creditor which accepted the same. (R. pp. 3-4.)

The issues thus raised were tried to a jury, and

THE EVIDENCE

adduced by the petitioners established that, on March 14, 1913, defendant, through his attorney, wrote petitioners and other creditors stating his total indebtedness to be $3,341.19 and his total assets at $1,000.00, and offering monthly proportionate payments if permitted to remain in business; and that on March 15, and April 15, 1913, he made two payments of $10.00 each to Cudahy & Co., in consideration of their deferring action in the suit against him, as aforesaid, for the recovery of $215.86. (R. pp. 12-13.)

The alleged bankrupt, in his testimony, admitted the writing of said letters, through his attorneys, tendering proportionate monthly payments to creditors, and admitted the two payments of $10.00 each on March 15, and April 15, 1913, to Cudahy & Co., as aforesaid. He denied, however, that said payments were made with intent to prefer Cudahy & Co. over his other creditors, and stated that they were made for the purpose of preventing that company from procuring a preference through suit and judgment and to prevent the resulting annoyance of attaching his assets (R. pp. 13 and 14); that his offer of proportionate monthly payments to creditors were made in good faith; that his monthly earnings at that time were sufficient to make such payments; that said offer of proportionate payments had never been withdrawn; that it was made for the purpose of treating his creditors alike and of enabling him to remain in business; and that, at the time of, and subsequent to, the making of such offer, and the agreed proportionate payments to Cudahy & Co., defendant was purchasing, and had been purchasing, supplies and goods from the several creditors, including petitioners, and had paid them in cash therefor. Respondent Hoover

also testified that he had been in business in the District of Columbia fourteen years (R. pp. 13-14).

At the close of the testimony counsel for the petitioners moved the court for a directed verdict for the petitioners; and, upon said motion being overruled, an exception was duly taken and noted.

Thereupon, counsel for the petitioners prayed the court to instruct the jury as follows:

> "The jury are instructed that it is conclusively established by the testimony of the defendant Hoover that he was insolvent in March and April, 1913, and knew himself to be insolvent. If, therefore, they shall find that while insolvent and having knowledge of his insolvency, he made payments to Cudahy & Company on account of his pre-existing debt to them, and did not make similar payments to his other creditors, he committed an act of bankruptcy, and the jury should so find."

The court refused the foregoing instruction (to which refusal counsel for petitioners duly noted an exception), and submitted to the jury (1) the question of insolvency at the time of making either or both of the payments of $10.00 each, and (2) the question of the alleged bankrupt's intent to prefer Cudahy & Co., by reason of the making of said payments, pursuant to agreement. The court's instruction permitted the jury, in returning its verdict, to consider the circumstances surrounding the transactions relied upon by petitioners to establish intent to prefer one creditor over other creditors, as well as to consider the good will and trade of the alleged bankrupt as an asset if he remained in business.

The jury returned a special verdict to the effect (1) that defendant Hoover was insolvent at the time of making said payments to Cudahy & Co.; and (2) that said payments were not made with intent to prefer said Cudahy & Co. over his other creditors. A general verdict for the alleged bankrupt was also returned. (R. pp. 17-19.)

From the decree dismissing the petition, this appeal and writ of error have been prosecuted by petitioners from the court below.

ARGUMENT.

The questions of insolvency and intent to prefer were properly submitted to the jury. They are questions of fact, and, as to the question of intent in this case, the evidence was such that the minds of reasonably cautious and prudent men might differ as to the existence or non-existence of such intent on the part of the alleged bankrupt. Furthermore, the jury were properly instructed as to the consideration of all the facts and circumstances surrounding the alleged act of preference, with a view to ascertaining the good faith on the part of Hoover, and his likelihood of being able to remain in business.

In the case of *In re Bloch*, 6 A. B. R., 303, the act of preference charged consisted of the transfer of certain promissory notes to one Sinclair, which notes were endorsed by another person named Bloch who was a brother-in-law of the alleged bankrupt. The trial court instructed the jury that the intent to prefer must be presumed from the mere act of transferring the securities; and that the alleged bankrupt was estopped, by said act, from denying the intention to prefer one creditor over the others. In disposing of the appeal, which involved said instruction, the Circuit Court of Appeals for the Second Circuit said:

"Inasmuch as testimony was given by F. E. Bloch to show the reasonableness of his expectation of being able to carry on the business, and the absence of intention to prefer a creditor, the question of intent should have been submitted to the jury."

"The statute gives a jury trial of right with respect to the debtor's *insolvency and any act of bankruptcy alleged in the petition to have been committed*, but in no other instance. Although the jury is limited to these two questions, *the respondent is entitled to go to the jury upon everything which affects or enters into either or both of these issues.*"

Loveland on Bankruptcy, pp. 493, 494, citing *Buffalo Milling Co.* v. *Lewisburg Dairy Co.*, 159 Fed., 319; *Schloss* v. *Strelow & Co.*, 156 Fed., 662; *Bean-Chamberlain Mfg. Co.* v. *Standard Spoke & N. Co.*, 131 Fed., 215.

PRESUMPTION OF INTENT TO PREFER MAY BE REBUTTED BY PROOF.

In cases where a *considerable portion* of an alleged bankrupt's property is transferred, *or substantial sums of money are paid*, a presumption may arise to the effect that a preference was intended; but such presumption, even in those instances, may be overcome by competent proof of a contrary intent.

"The intent of the debtor alone is to be considered in determining whether he has commit-

ted an act of bankruptcy within this provision * * * *"

Loveland on Bankruptcy, p. 317, citing 152 Fed., 978; 156 Fed., 1009; 131 Fed., 769; 112 Fed., 951; 127 Fed., 228; 62 C. C. A., 172.

"The transfer by an insolvent debtor of his property, *or a considerable portion of it*, to one creditor in payment of or as a security for a pre-existing debt, *without making provision for an equal distribution of its proceeds to all of his creditors*, operates as a preference to such creditor, and must be taken as *prima facie* evidence that a preference was intended."

"The evidence of intent resulting from the fact of a preference by an insolvent is very persuasive, but may be overcome by proof on the part of the debtor. * * *"

"The presumption of intent to prefer may be overcome by showing * * * that the payment of bills as they matured were made in the ordinary course of business without any intent to give a preference or in contemplation of bankruptcy, *or that the preferred creditor did not receive a greater percentage of his claim than the other creditors of the same class also will receive, or that the payments are so trivial that the percentage of the other creditors will not be substantially affected.*"

Loveland on Bankruptcy, pp. 318-321, and cases there cited.

The case of *Macon Grocery Company* v. *Beach*, 19 A. B. R., 558 (D. C. Ga.), was where the alleged bankrupt had made a payment of but a few dollars to a creditor, and that transaction was charged against him as an act of bankruptcy. It was held that no preference was intended, and the court, after citing many authorities to the effect that intent to prefer will be presumed from the fact of payment, said:

> "It will be found, however, that in each of these cases a *substantial* preference had been made, that a preferential intent was always inferable, and that the consequent injury to other creditors was significant and distinct. * * * In each case the insolvency of the bankrupt was conceded or proven. Then, when he has made a payment to a particular creditor, he is presumed to have intended to prefer him, as it will enable that creditor to obtain a greater percentage of his debt than will inure to others. *But if the payment of a debt is of that infinitesimal sort that it can have no appreciable consequence, is an intent to prefer a necessary, natural, consequence of such payment?*"

In answering this question in the negative, the court cited and quoted from the opinion of Mr. Justice Field in the case of *Toof* v. *Martin*, 13 Wall., 40, to the effect that the presumption of intent to prefer one creditor over another may be overcome by competent proof, such, for example, as by establishing that the alleged bankrupt can reasonably expect to continue in business, or that he was ignorant of his insolvency.

PAYMENTS OF SMALL OR TRIVIAL SUMS IN PROPORTION TO THE ENTIRE INDEBTEDNESS, ARE NOT PREFERENTIAL PAYMENTS.

Where the amounts or sums of money paid are small or trivial, as compared with the entire indebtedness of an alleged bankrupt, no legal presumption arises to the effect that a preference is intended; and, as in all other cases, the burden of proving insolvency and preference is upon the petitioning creditors.

In re Stovall Groc. Co., 20 A. B. R., 537.
Loveland on Bankruptcy, p. 1326.
Macon Groc. Co. v. Beach, supra.

"*A presumption of an intent to prefer will not be indulged in against an insolvent debtor by his mere act of paying certain creditors small sums in the usual course of business, and apparently in an effort to keep the business going*, so as to establish an act of bankruptcy; and in the absence of satisfactory proof that the necessary effect of such payments was to give the creditors receiving them a greater percentage of their debts than the other creditors of the same class, they are not preferential."

In re Douglass Coal & Coke Co., 12 A. B. R., 539.

"The presumption of an intent to prefer creditors arising from the transfer of property by an insolvent debtor is affected by the amount of the transfer, and where the transfer was a comparatively small part of the debtor's property, the ex-

pediency of resorting to a bankruptcy court, rather than permit a distribution of his assets through pending proceedings in the State court, may be doubted."

In re Gilbert (D. C. Oregon), 8 A. B. R., 102.

From the foregoing authorities it will be seen that presumptions of insolvency and intent to prefer will be indulged only in cases where those facts are apparent from all the circumstances, such, for example, as payments of large sums, the transfer of large and valuable properties; but, even in such cases, the presumptions may be rebutted by competent proof on the part of the alleged bankrupt. And, where the payments are small, as compared with the total indebtedness, as in the case at bar, presumptions of insolvency and intent to prefer will not be indulged, but the burden is upon petitioners to prove these facts by a preponderance of evidence.

PAYMENTS TO AVOID SUITS RAISE NO PRESUMPTION OF INTENT TO PREFER.

In the case of *Goodlander-Robertson Lumber Co.* v *Atwood*, 18 A. B. R., 310 (C. C. A. 4th Cir.), payments of $160.00 and $121.15 were collected by an attorney from the alleged bankrupt, the latter making payments of the amounts to avoid suit. Certain creditors sought, because of such payments, to have him adjudged a bankrupt; but the court, without a jury, held that under the circumstances there was no evidence of intent to prefer one creditor over another. The Circuit Court of Appeals, McDowell, J., observed that the consequences of the payments in question, reasonably to be expected,

were a continuance in business, with the prospect of the ultimate payment of all creditors in full; that the intent to prefer is an intent that some creditors shall receive a greater percentage of their debts than others of the same class; and that, in the case then under consideration, the evidence negatived such intent on the part of the alleged bankrupt. The court also observed that counsel for appellants had apparently overlooked the "good will" of the alleged bankrupt, which, in connection with his showing that he could remain in business, ought to be taken into consideration.

In the case at bar the alleged bankrupt, as shown by the evidence adduced at the trial, submitted an offer to all of his creditors (including the petitioners) to make proportionate monthly payments of his indebtedness to them if they would permit him to remain in business; and, in that offer to each of the creditors, he expressed his belief that such a plan would admit of his remaining in business and finally paying all of his indebtedness. The creditor to whom the alleged preferential payments were made (Cudahy & Co.), which had already instituted proceedings against the debtor, accepted his proposition of monthly proportionate payments; and it is insisted that this course of action by the alleged bankrupt, founded upon good faith, is such as to preclude any presumption of intent to prefer, and that the burden of proving such intent was upon the petitioners.

Upon the evidence adduced at the trial, the jury were warranted in finding that the alleged bankrupt did not make the payments in question with intent to prefer one creditor over another; and it is respectfully urged (1) that the verdict and judgment of the lower court

should be affirmed and (2) that the appeal and writ of error herein should be dismissed.

Respectfully submitted,

EDWARD F. COLLADAY,

Attorney for the Alleged Bankrupt.

SWIFT & COMPANY ET AL. *v.* HOOVER.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 101. Submitted November 14, 1916.—Decided December 4, 1916.

A decree of the Supreme Court of the District of Columbia refusing to adjudicate defendant a bankrupt is not directly reviewable in this court.

Under § 24 of the Bankruptcy Act and § 252 of the Judicial Code, only controversies arising in bankruptcy proceedings, and not the steps taken in the proceedings themselves, afford basis for direct appeal to this court from the Supreme Court of the District of Columbia.

Quære: Whether Congress has omitted to provide for appellate review of bankruptcy adjudications of the Supreme Court of the District of Columbia.

THE case is stated in the opinion.

Mr. Arthur A. Birney, Mr. H. W. Wheatley and *Mr. Lucas P. Loving* for plaintiffs in error and appellants.

Mr. E. F. Colladay for defendant in error and appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This case is brought here by appeal and allowance of writ of error, from a decree of the Supreme Court of the District of Columbia, adjudging Hoover not a bankrupt. Counsel for the appellee and defendant in error urges that the appeal and writ be dismissed, but does not argue the question of the jurisdiction of this court; but, as such matters are noticed by this court whether specially urged by counsel or not, as it concerns our jurisdiction, we proceed to consider it. *Mansfield &c. Ry. Co.* v. *Swan*, 111 U. S. 379.

The provisions of the Bankruptcy Act for consideration in this connection are:

"Section 24. The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia. . . .

"Section 25. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; . . ."

The same provision as to the review by this court of controversies arising in bankruptcy proceedings is carried into the Judicial Code, § 252, in which provision is made for the review in this court of controversies arising in bank-

ruptcy proceedings in the Supreme Court of the District of Columbia.

It is apparent from reading these sections of the statute that a direct appeal to this court from the Supreme Court of the District of Columbia is allowed only in controversies arising in bankruptcy proceedings, and not from the steps in a bankruptcy proceeding. The nature of such controversies has been frequently considered in decisions of this court, and needs little discussion now. Such controversies embrace litigation which arises after the adjudication in bankruptcy, sometimes by intervention, the parties claiming title to property in the hands of the trustee, or other actions, usually plenary in character, concerning the right and title to the bankrupt's estate. Such proceedings as the present one, resulting in a decree refusing to adjudicate the defendant a bankrupt, are but steps in a bankruptcy proceeding and not controversies arising in bankruptcy proceedings within the meaning of the statute. *Denver First National Bank* v. *Klug*, 186 U. S. 202.

The decisions of this court in *Tefft, Weller & Company* v. *Munsuri*, 222 U. S. 114, and *Munsuri* v. *Fricker*, 222 U. S. 121, are decisive of this point. In the first of these cases there was an attempt to prosecute a direct appeal to this court from the District Court of the United States for Porto Rico, where the proceeding was based upon a claim in bankruptcy. It was there held that an order of the bankruptcy court of Porto Rico, disallowing the claim, was not a controversy arising in a bankruptcy proceeding within the meaning of the statute. The contention that such action, based upon a claim filed in a bankruptcy proceeding, was appealable to this court was denied, the court saying:

"But the entire argument rests upon a misconception of the words 'controversies in bankruptcy proceedings,' as used in the section, since it disregards the authoritative

construction affixed to those words. *Coder* v. *Arts*, 213 U. S. 223, 234; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300. Those cases expressly decide that controversies in bankruptcy proceedings as used in the section do not include mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, even although they may arise in the course of proceedings in bankruptcy."

It is true that in *Audubon* v. *Shufeldt*, 181 U. S. 575, and in *Armstrong* v. *Fernandez*, 208 U. S. 324, this court did review proceedings in bankruptcy—in one case from the District of Columbia, and in the other from the District Court of the United States for Porto Rico. Of the *Armstrong Case*, which was a review by appeal of an adjudication of bankruptcy, this court, in the *Tefft, Weller & Company Case, supra*, said:

"It is true, as suggested in argument, that in *Armstrong* v. *Fernandez*, 208 U. S. 324, jurisdiction was exerted to review the action of the court below in a case which was not susceptible of being reviewed under the construction of the statute which we have here applied. But in that case there was no appearance of counsel for the appellee, and while a general suggestion was made in the argument of appellant as to the duty of the court not to exceed its jurisdiction, no argument concerning the want of jurisdiction was made. The case therefore in substance proceeded upon a tacit assumption of the existence of jurisdiction, an assumption which would not be now possible in consequence of the authoritative construction given to § 24 (a) in *Coder* v. *Arts, supra*. Under these circumstances, the mere implication as to the meaning of the statute resulting from the jurisdiction which was in that case merely assumed to exist, is not controlling and the *Armstrong Case*, therefore, in so far as it conflicts with the construction which we here give the statute, must be deemed to be qualified and limited."

It may be true that Congress has failed to give an appellate review in proceedings in bankruptcy from the Supreme Court of the District of Columbia from a decree with reference to an adjudication in bankruptcy, but, as observed in the *Tefft, Weller & Company Case*, that does not give this court authority to assume jurisdiction not given to it by law.

It follows that the appeal and writ of error must be dismissed for want of jurisdiction.

Dismissed.